NO. 80-759

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALBERTO SANCHEZ, et al,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, et al; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., ROY and JOSIE FISHER, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE NINTH CIRCUIT

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Tucson, Arizona 85701
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Attorney for Petitioners
Alberto Sanchez, et al.

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require mailed notice of a proposed settlement in a school desegregation case where the school district maintains a complete list of all class members and their last known addresses?

2. Does the Fourteenth Amendment or Rule 23(e) require the notice of settlement in a school desegregation case to state that the proposed compromise provides for immediate closure of minority schools?

3. Does the Fourteenth Amendment or Rule 23(e) require the notice of settlement in a school desegregation case to state that the proposed compromise provides for dismissal with prejudice and without trial all claims alleging a denial of equal educational opportunities?

4. May class counsel simultaneously negotiate attorney's fees and a resolution of all substantive issues remaining in a school desegregation case?

5. In the event that counsel for the parties negotiate a school desegregation plan as one part of a single compromise settling all issues in the litigation, does the Fourteenth Amendment, Rule 23(e), Federal Rules of Civil Procedure, or the Manual for Complex Litigation, section 1.46, prohibit the District Court from conclusively approving the remedial plan without notice to the class, and subsequently conduct a settlement hearing at which objections to the remedial plan are not allowed?

PARTIES TO THE PROCEEDINGS

Petitioners herein:

Plaintiffs and Objectors/Appellants below:

ALBERTO SANCHEZ, NADINE SANCHEZ, BETTY SANCHEZ, GEORGE SANCHEZ, ERNEST SANCHEZ, JOHN SANCHEZ, JULIA O FLOREZ, BILLIE GUTIERREZ, THERESA MEDINA, BETTY M. GRANILLO, CAROL CRUZ-POPKIN, BARNEY PAUL POPKIN, CARMEN P. URRUTIA, MANUEL ALVARADO, CAROLYN HACKWORTH, GLORIA HAGLER, JOHNNY RANDOLPH-KELLY, THELMA B. MANRIQUEZ, ADOLFO A. SUAREZ, NAT WASHINGTON, II, RALPH O. GOMEZ, JUAN BRITO, MARCIA ALMEDA, EMILIA TALAMANTEZ, ELLEN LEE, ESPERANZA SILVA, ANTONETTE ROMO, RONALD Q. HUERTA, AND LUPE MONTANO

Respondents herein:

Plaintiffs/Appellees below:

MARIA MENDOZA, THERESA TRUJILLO, ALBERT TRUJILLO AND DAVID TRUJILLO; ROY and JOSIE FISHER, next of kin of ELIZABETH FISHER, BOYD and ELIZABETH LEWIS, next of kin of ELIZABETH ELLEN, WARREN, and JEFF LEWIS; LLOYD D. and VIRGINIA HALL, next of kin of KENNETH and LLOYD D. HALL; and GEORGE and JOYCE BROWN HUTTON, next of kin of MONDRE HUTTON; all on behalf of any persons similarly situated

Respondent herein:

Plaintiff-Intervenor/Appellee below:

UNITED STATES OF AMERICA

Respondents herein:

Defendants/Appellees below:

TUCSON SCHOOL DISTRICT NUMBER 1; THE BOARD OF EDUCATION, TUCSON SCHOOL DISTRICT NUMBER 1; LEBA WINE, SOLENG TOM, MITCHELL VAVICH, HELEN HAFFLEY, and KATIE DUSENBERRY, individually and as members, Board of Education, Tucson School District Number 1; THOMAS LEE, individually and as Superintendent of Tucson School District Number 1; and ANITA LOHR, individually and as Pima County School Superintendent

Respondents herein:

Defendants-Intervenors/Appellees below:

SIDNEY L. SUTTON, SALLY J. SUTTON, and SIDNEY L. SUTTON and SALLY J. SUTTON as Parents, Natural Guardians and next friend of SEAN SUTTON; JOHN R. CENTENO, MARY KATHERINE CENTENO and JOHN R. CENTENO and MARY KATHERINE CENTENO as Parents, Natural Guardians and next friend of SANDRA KATHERINE CENTENO and JAMES LEE CENTENO; LIBRADA G. RUIZ and LIBRADA G. RUIZ as Parent, Natural Guardian and next friend of ANDRES L. RUIZ; SIDNEY TAIZE and SIDNEY TAIZE as Parent, Natural Guardian and next friend of JONATHAN TAIZE, LISA TAIZE and JOSHUA TAIZE

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law entered on June 5, 1978 by the District Court are unreported. The pertinent Orders of the District Court are also unreported, but contained in Petitioner's Appendix B through I, pages 61-124.

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 27, 1980, and is reported at 623 F.2d 1338.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1980, and the Petition for Rehearing was denied and the Suggestion for Rehearing en banc was rejected on August 11, 1980. (App. K P. 151); the jurisdiction of this Court is invoked under 62 Stat. 928, 28

U.S.C. 1254(1).

STATUTES INVOLVED

Amendment 14, Section 1, to the United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 718 of the Act of June 23, 1972, 86 Stat. 369, 20 U.S.C. §1617, provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision

of this title [20 USCS §§1601 et seq.] or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rules of Civil Procedure, Rule 23 et seq. See Appendix O , p. 180 through 184 for full text.

Section 601, of the Act of July 2, 1964, 78 Stat. 252, 42 U.S.C. §2000d provides:

§2000d. Nondiscrimination in federally assisted programs

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

activity receiving Federal financial assistance. (July 2, 1964, P.L. 88-352, Title VI, §601, 78 Stat. 252.)

Code of Professional Responsibility, Canons 5 and 7. See Appendix P p. 185 through 188 for full text.

STATEMENT OF THE CASE

In late 1974, Mexican-American plaintiffs filed an Amended Complaint in Federal District Court alleging that Tucson Unified School District No. 1 (hereafter referred to as "District") had: Count 1: Maintained a tri-ethnic segregated school system; Count 2: Engaged in discriminatory tracking; Count 3: Maintained inferior curricula and facilities for minorities; Count 4: Discriminated in the hot-lunch program; Count 5: Discriminated in special education programs; Count 6: Failed to properly take into account linguistic differences; and Count 7: Failed to employ bilingual notices.[1/] The action was certified as a class action in December of 1975.[2/]

1/ The District Court found jurisdiction pursuant to 28 U.S.C.§1331(a), §1343(3) and (4).

2/ The trial court certified the action under Rule 23(b)(1),(b)(2) and (b)(3).

Class members were given an opportunity to opt out and some 1,450 of the estimated 17,000 chose to do so. Individual notice of the pendency of the action was delivered to class members.[3/] In June, 1976, plaintiffs Mendoza, et al., moved to stay proceedings on Counts 2, 5 and 6 of their Amended Complaint. The District Court stayed and severed these Counts from further discovery and trial. A Stipulation and Order was filed dismissing Count 3 of plaintiffs' Mendoza's Amended Complaint without prejudice and dismissing with prejudice Counts 4 and 7. The class was not notified of the Stipulation or the Court's order.

The consolidated cases were tried from January 11 through January 21, 1977. The issue at trial was whether the District

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3/ During class notices were given to children for delivery to their parents.

was then maintaining a dual or segregated school system in violation of the Equal Protection Clause of the Fourteenth Amendment, Count 1 of plaintiffs' Mendoza's Amended Complaint. On June 5, 1978, the Court found that the District had not operated a dual Mexican-American/Anglo system, but that it had acted with segregative intent between 1951 through 1976, and that the effects of those actions remained at nine schools--Spring and Safford Junior High Schools and University Heights, Roosevelt, Manzo, Jefferson Park, Cragin, Tully and Brichta Elementary Schools.

On June 5, 1978, the Court also ordered the District to propose a plan to eliminate the vestiges of racial and ethnic discrimination which would be heard and, if possible, implemented by the beginning of the 1978-79 academic year. (App. B , P. 62).

On July 17, 1978, the District was ordered to file a desegregation plan by that same date. In its Order, the Court also set August 2, 1978 as the last day for the plaintiffs to file objections to the plan or present alternatives, and August 8, 1978, for hearing on all such submissions. The Order further required counsel to inform each class of the contents of the plan or plans and, to advise the Court of the extent to which class members agreed or objected to their provisions. (App. C , P.67). Formal notice to the class of the hearing was not required by the District Court.

Settlement negotiations began immediately after entry of the June 5 Order. On August 2, 1978, six days before the hearing on the desegregation plan, counsel for all parties informed the trial court that they had reached a final settlement, which included but was not limited to the

plan itself. A stipulation of settlement was filed and accepted in lieu of compliance with the July 17, 1978 Order requiring counsel to inform the Court of class members' objections to or agreement with the proposed desegregation plan. (App. J&N, P. 125 & 173).

On August 4, 1978, the Court ordered that a fairness hearing on the stipulation of settlement be held on August 24, 1978. (App. D , P. 73). No preliminary hearing was conducted to determine whether the stipulation of settlement fell within the range of reasonableness. The hearing on the desegregation plan, set before the parties had informed the trial court that they had reached a tentative settlement, was not vacated even though the remedial plan was part of the overall compromise.

During the course of settlement negotiations, it became clear that counsel for the Mexican-American class had agreed

to the closure of three inner-city minority schools in exchange for other concessions by the District.[4/] On July 27, 1978, petitioner Sanchez, who opposed the closures and was the only remaining named plaintiff with children in District 1 schools, requested substitution of counsel on behalf of himself and the class he represented. On August 3, 1978, the Court ordered substitution for Sanchez and his children only. The next day, Sanchez filed a motion to create a subclass comprised of Mexican-American parents and their children who resided in attendance areas served by the schools which would

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4/ "Once a decision was rendered concerning the liability of the District, settlement negotiations were commenced and eventually led to the point that closure of some minority schools became probable. At that point, a difference of opinion arose between plaintiff Sanchez and other named plaintiffs, and he sought and was allowed separate counsel for himself." App. F , P. 100 Order Denying Certification of A Subclass.

be closed pursuant to the settlement. Sanchez's motion was heard August 7, 1978. The Court conducted a hearing on the desegregation plan the following day. The District, with the approval of the plaintiffs, presented evidence in support of the desegregation plan, and requested that the District Court approve it as it appeared in the settlement. Counsel for all parties to the agreement informed the Court that pursuant to the stipulation of settlement, they would not object to the desegregation plan nor present alternatives, but requested leave to oppose the plan and present alternatives if the settlement proposed was not accepted by the Court. Petitioner Sanchez offered no evidence at the hearing except his own testimony. He made prior requests to the Court to continue the hearing on the desegregation plan in order that he might oppose it effectively and present

alternatives, but the requests were denied. Numerous class members, without benefit of counsel, spoke in opposition to the desegregation plan during the "public comment" portion of the hearing. No formal notice of this hearing was provided the class. On August 11, 1978, the trial court issued two Orders: The first approved the desegregation plan; the second denied Sanchez's motion for subclassification (App. E , P. 75 ; App. F P. 98).

In denying petitioner's motion for subclassification, the District Court observed that its membership was composed of persons who opposed closure. Since that precise issue had been conclusively determined against them, the Court deemed subclassification unnecessary as well as inappropriate. Additionally, the Court observed that since counsel only agreed to

the desegregation plan as part of an overall settlement, class members would have an opportunity to object to clousre at the settlement hearing.[5/]

Likewise, in its order approving the desegregation plan, the Court noted that it had been negotiated as part of the settlement:

> "All other named plaintiffs have entered into a proposed settlement with the defendants which resolves all issues raised in these consolidated cases. As part of the settlement, plaintiffs, other than Sanchez, have raised no objections to the plan offered by the defendants as to the

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5/ "Secondly, the other plaintiffs have only agreed to these closures as part of an overall settlement. Concessions of viable issues are necessarily made in settlements and Title 28 United States Code, Federal Rules of Civil Procedure 23(e) adequately provides for class members who object to certain concessions. There will be a hearing on the proposed settlement at which all class members will have an opportunity to be heard." App. F, P.101-P. 102, Order Denying Certification of a Subclass.

nine schools included within the Court's June 5, 1978 order." (App. E , P. 76-77).

On August 14, 1978, the Court approved a notice of settlement and the proposed method for disseminating it. (App. G , P.105). Although the stipulation of settlement provided for the dismissal of Counts 2 through 7 of the Amended Complaint in the Mendoza action, the notice did not state that those claims would be dismissed if the settlement were approved. Similarly, it failed to mention that several schools would be closed pursuant to the compromise. Rather, it stated that the schools targeted for closure would be "operated" according to certain options set forth in the desegregation plan. (App. L , P.158). These options dictated the immediate closure of inner-city minority schools. Petitioner Sanchez objected to the content of the

notice and also to the method dissemination approved by the Court.

Petitioner argued that the notice should have been mailed to the class. The District had a complete list of all class members and their addresses; it had previously mailed information to them on a regular basis. At the hearing on the settlement, the District's witness, Assistant Superintendent Starr, testified ". . . that we have a master list of all parents' addresses and we certainly, if we are going to contact them, would put something in the mail. . .". The Court denied the motion and directed that the notice be published in the local press. (App. G , P. 107). Publication began on August 22, 1978, eight days before the hearing on the settlement. During the first three days of publication, the notice appeared in the classified section

under the heading "Legal Notices" in small, unbordered print. Petitioner Sanchez objected to the placement of the notice in the classified section and on the remaining four days prior to the hearing, it appeared in a separate section of the local newspapers in bold-face type surrounded by a black border.

On August 7, 1978, petitioner Sanchez served a request for production upon the District and counsel for the Mexican-American class. Since a response was not forthcoming, petitioner filed a formal motion nine days later. In doing so, he specifically requested discovery on the school closure provisions of the stipulation of settlement. On August 22, 1978, the District Court denied any discovery on closure reasoning that the issue was moot because the remedial plan had been approved in the Order of August 11. (App. H, P. 111). Responses to such discovery

as the trial court allowed were not received by petitioners until August 29, 1978, the day before the fairness hearing.

On August 30, 1978, notice of designation and appearance of counsel for named objectors was filed by petitioner's attorney together with objections to the proposed settlement. The objections asserted that closure of three minority schools would place an undue burden of desegregation on minority children; that the closures would promote and/or maintain segregated residential patterns and schools; that the distribution and content of the settlement notice was defective; and that the inclusion of attorney's fees in settlement negotiations was improper. The hearing on the settlement proceeded as scheduled on August 30, 1978. The trial court, however, would not permit inquiry into or presentation of evidence on the desegregation plan. It also refused to

permit any inquiry into the role played by attorneys' fees during the settlement negotiations.

Counsel for the Mexican-American class presented one witness in support of the proposed settlement. Her name was Olma Riggs and she testified that she had no place of residence, but lived in her Ford Pinto station wagon. Her testimony related to only one aspect of the settlement, which was a reading program for thirty students of one year's duration. The remaining witnesses were called by the District and counsel for the Fisher class. They testified in support of settlement provisions pertinent to Black children, i.e., paragraphs 10, 11, 12, 13, 14 and 15 of the stipulation of settlement. Most of these witnesses testified that programs, similar to those designed for the Black students, should have been developed for children in the Mendoza class. Moreover,

several of these witnesses also testified that they would have prepared comparable programs for Mexican-American students if they had been asked to do so.

At the close of the second day of hearings, the Court approved the compromise as submitted. On September 28, 1978, appellants filed their notice of appeal contesting the trial court's Orders of August 11, 1978, denying petitioner's motion for subclassification and approving the desegregation plan, and from its Order of August 31, 1978, approving the settlement. On June 27, 1980, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's Orders and on August 11, 1980, it denied petitioner's motion for rehearing and rejected a suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

1. Notice by Publication Denied the Class Due Process of Law.

The sole attempt to notify all class members of the settlement and the attendant hearing proceeded by publication in the local newspapers. Despite its disapproval of published notice, the Ninth Circuit cited Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306 (1950) in holding that the procedure satisfied due process. It reasoned that settlement of an action certified under Rule 23(b)(2) provides for a "structural injunction" affecting all class members equally. Methods of notification suffice if they prompt a segment of the class to attend the final hearing and express common objections to the agreement.

The analysis is squarely at odds with Mullane and its progeny. Since the individual interests at stake in that case were "identical with [those] of a class" "any

[successful] objections [to the accounting] would [have] inure[d] to the benefit of all." Mullane, 339 U.S. at 319. That fact did not determine the process due at the final stage of the litigation: Notice must always serve the elementary and fundamental purpose of ensuring that every person legally affected by a proceeding receives an opportunity to be heard. Mullane, 339 U.S. at 314.

> "This right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, 339 U.S. at 314.

Notice has not been accorded such importance for the convenience of the trial court in order that it may entertain "common" objections to a proposed settlement. Rather, it is vital to the protection of each individual whose rights may be compromised or denied in subsequent proceedings. Id.

For that reason, this Court has repeatedly and unequivocally condemned notice by publication. Eisen v. Carlisle & Jacquelin (Eisen III), 417 U.S. 156, 174-177 (1974) (relying principally on Mullane); Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchison, 352 U.S. 112 (1956); New York v. N.Y., N.H. & H.R. Co., 344 U.S. 293 (1953); Mullane, 339 U.S. at 315-18. "Chance alone" determines whether "even a local resident" will actually see published notice and learn that his interests are subject to final adjudication. Mullane, 339 U.S. at 315. Individual notice must, therefore, be mailed to each person whose identity and whereabouts are readily ascertainable. The Court of Appeals has now adopted a standard diametrically opposed to that principle:

> "A party's capability to provide individual notice does not make such notice mandatory

> when notice by publication will suffice." (App. A, p. 50).

Since Mullane, this Court has consistently held that published notice is insufficient in precisely those cases where the responsible party can provide individual notification without undue difficulty. Eisen III, 417 U.S. at 174-75.

Here, as in Eisen III, the defendants below maintained a complete list of all class members and their addresses. Prior to the settlement hearing, the District had routinely publicized significant events by mailing individual notice to each parent whose children attended its schools. That fact alone demonstrates the ease with which the same procedure could have been followed at the settlement stage; it negates any claim of undue burden, inconvenience or expense. Mullane, 339 U.S. at 319.

Furthermore, assuming arguendo that the nature of the relief at issue deter-

mines the notice due the class, the settlement in this action did not merely provide for a "structural injunction". The final compromise dismissed all claims alleging that the Mendoza class had been denied equal educational opportunities with prejudice and without a trial on the merits. Adequate notice of the settlement was, therefore, especially imperative. In reviewing settlement proceedings in a school desegregation case decided two months before the opinion below was announced, the Seventh Circuit required individual notice to all persons in the plaintiff class. Armstrong v. Board of School Directors, Etc., 616 F.2d 305, 313 (7th Cir. 1980). Given the importance of the issue in future civil rights litigation, the current division of authority among the Circuits ought to be resolved immediately.

The Court of Appeals also relied on

certain attempts to supplement notice by publication. The record demonstrates that they amounted to less than a "mere feint". Mullane, 339 U.S. at 315. Copies of the settlement notice were left at local radio and television stations, but the content was never broadcast prior to the hearing itself. Several hundred copies were available at certain schools and each of seven businesses in minority neighborhoods. Since the schools were closed for summer vacation, class members received them only if they attended a meeting at these places. Similarly, notices delivered to a few businesses did not reach class members unless they visited them, were identified as such and provided copies by third parties who had no legal duty to do so.

Apart from the fact that far fewer notices were available than the 17,000 required for individual distribution, the technique did not satisfy the requirements

of Mullane. Receipt of notice may not be conditioned on adventitious events, nor may the burden of notification fall upon affected individuals. Walker, 371 U.S. at 212-214. Mullane and its successors draw the clearest possible distinction between those interested persons who can and cannot be identified as well as located. Due process demands the "reasonably certain" method of mailed notice in any case where their identity and whereabouts are easily determined. Mullane, 339 U.S. at 318-19.

Finally, the Ninth Circuit cited extensive publicity surrounding the litigation as further justification for published notice, while ignoring yet another defect in the methods used here. The publicity was not aimed at individual class members, nor was it intended to apprise them of specific settlement terms, the procedure for lodging objections, documents pertinent to the compromise or

the time and place of the final hearing. See Mullane, 339 U.S. at 315. At most, it furnished some actual notice that a settlement had been reached, but informal knowledge of a proceeding is no substitute for legal notice properly disseminated to interested parties. N.Y., N.H. & N.R. Co., 344 U.S. at 297.

On August 14, 1978, the District Court ordered publication to commence as soon thereafter as possible. The text first appeared in fine print beneath the column headed "legal notices" on August 22, 1978, eight days before the settlement hearing itself. That format was only changed after counsel for the petitioners filed a formal objection two days later. Mullane condemned published notice in the precise form which the parties selected and the trial court subsequently approved. 339 U.S. at 315.

Furthermore, notice "must afford a

reasonable time for those interested to make their appearance." Citations omitted. Id., 339 U.S. at 314. Here, five days of publication outside the classified section of local newspapers preceded a settlement hearing in a school desegregation case commenced four years earlier. In the time alloted, a reasonable understanding of the compromise, preparation of testimony and submission of proper objections was impossible.

It is, indeed, no "accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers." Id., 339 U.S. at 315. Since that decision, notice of settlement in federal class actions has consistently proceeded by individual mailings. See, e.g., Armstrong, 616 F.2d at 310; In Re Gypsum Antitrust Cases, 565 F.2d

1123 (9th Cir. 1977) Marshall v. Holiday Magic, 550 F.2d 1173 (9th Cir. 1977); Grunin v. International House of Pancakes, Inc., 513 F.2d 114 (8th Cir. 1975); Oburn v. Shapp, 393 F. Supp. 561 (E.D. Pa. 1975), aff'd. on other grounds, 521 F.2d 142 (3rd Cir. 1975). In Eisen III, this Court reiterated Mullane's teaching--adequate notice of the proceedings in a class action remains an essential requisite of due process. Mailed notice passes constitutional muster; publication "[has] long been recognized as poor substitute for actual notice. . .its justification is difficult at best." Eisen III, 417 U.S. at 213.

The Court has not passed on the precise question which this case raises. While Eisen III dealt solely with procedural safeguards unique to an action certified under Rule 23(b)(3), the present issue is fundamental to the proper manage-

ment of all class actions at the settlement stage. In resolving it, the Ninth Circuit has disregarded the reasoning and holdings of this Court, which should now grant the petition for a writ of certiorari.

2. Notice Omitting Reference to School Closures Denied the Class Due Process of Law.

The notice of settlement indicated that various minority schools would be "operated" in accordance with "options" set forth in the desegregation "plan". If, the Ninth Circuit observed, the plan were part of the settlement, the notice might well have been "fatally defective" in its failure to state that three of the schools would be immediately closed once the district court approved the compromise. The settlement document recited that the parties stipulated and agreed to the desegregation plan. The record, including the pleadings, the statements of counsel and

the orders of the trial court, conclusively demonstrates that the plan was negotiated as one element of an overall compromise. See section 5 , infra. The decisions of this Court, which the Ninth Circuit has steadfastly ignored, foreclose any other interpretation of the agreement. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975); United States v. Armour & Co., 402 U.S. 673 (1971); United States v. Swift & Co., 286 U.S. 106 (1932).

In the context of desegregation, this Court has emphasized the significance of a decision to close schools:

> "The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex . . . Over the long run, the consequences of the choices will be far reaching. . . The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. Swann v. Charlotte-Meckleburg Board of Education,

402 U.S.1, 20-21 (1971).

Notice of a final adjudication "must be of such nature as to convey the required information. . .". Mullane, 339 U.S. at 314. Where a settlement in a desegregation case provides for the immediate closure of inner-city schools, the accompanying notice must state that fact in the clearest possible language. Absent such critical information class members cannot intelligently choose whether "to appear or default, acquesce [in] or contest" the parties' agreement. Mullane, 339 U.S. at 314. It is, however, "the purpose of notice under the Due Process Clause to apprise the affected individual of, and permit adequate preparation for an impending hearing." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14-15 (1978). Emphasis supplied.

In the instant case, class members could not learn of impending school clo-

sures even if they obtained and read the section of the settlement document setting forth the desegregation plan. Like the notice, it stated that schools would be operated according to certain "options" without specifying their purpose or content. In that respect, the notice of settlement did not merely fail to provide essential information; it affirmatively misled the class. Its clear reference to future "operation" of Spring, Roosevelt and University Heights schools could not possibly have communicated the essential fact that the settlement provided for immediate closure, not continued use, of those facilities.

The requirements of due process, as they apply to the settlement notice in civil rights litigation, are not mere formalities. Class members cannot determine that interests of basic importance may be lost, bargained away or denied unless they

are adequately informed of the proceeding at hand and its subject matter. Although it has not decided the question now presented, this Court has repeatedly stressed that the right to a meaningful hearing depends on the substantive adequacy of prior notice. Craft, 436 U.S. at 14-15.

The Ninth Circuit itself recognized that omissions in this settlement notice would have been fatal had the compromise included the desegregation plan. That fundamentally erroneous disposition of the constitutional issue can only be rectified by this Court.

3. Notice Omitting Reference to Dismissal of the Quality Education Courts Denied the Class Due Process.

As the Court of Appeals observed, the notice of settlement omitted any reference to the single most important provision of the compromise: The agreement stipulated that Counts 2,3,4,5,6 and 7 of the Amended

Complaint in the Mendoza litigation would be dismissed with prejudice. Although they alleged that Mexican-American children were subjected to discriminatory tracking, unequal curricula and other practices violating Title VI of the 1964 Civil Rights Act, none was ever tried. Once approved by the district court, a settlement dismissing them with prejudice constituted a final adjudication binding on all persons then in the class.

In addition to alleged de jure segregation, the Title VI counts were at the center of the Mendoza action. See Miliken v. Bradley, 418 U.S. 717 (1974) (the continuing discriminatory effects of de jure segregation frequently require affirmative educational efforts beyond a mere reassignment of faculty and students). Although the Ninth Circuit recognized the "potential" significance of its failure to mention school closures, that court never con-

sidered whether the settlement notice accorded due process by omitting any reference to the dismissals with prejudice. The Fourteenth Amendment will not countenance such a complete failure to notify interested parties that they are on the verge of finally losing an opportunity to vindicate their civil rights. Armstrong v. Manzo, 380 U.S. 545, 550 (1965). By reaffirming that principle, this Court will ensure that due process is afforded during any settlement of future class actions.

4. Counsel may not be Allowed to Negotiate Class Interests and Attorney's Fees Simultaneously.

Fully aware of the dangers inherent in the practice, the Ninth Circuit disapproved combined negotiations on fees and class interests. Even if a settlement fund is not at stake, the procedure allows counsel to enhance their personal gain at the expense of the plaintiff class. Con-

versely, it affords defendants a negotiating advantage which is all too easily exploited. Neither the trial court nor class members can reconstruct the bargaining process and independently determine that the introduction of attorney's fees did not improperly influence the final result. For these reasons, other Circuits have condemned the negotiating methods used in this case. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1216 N.71; Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977); see also Armstrong, 616 F.2d at 313, citing In Re General Motors Engine Interchange Litigation, 594 F.2d 1106, 1120 (7th Cir. 1979), cert. denied, 444 U.S. 870 100 S.Ct. 146 (1979).

Here, correspondence exchanged among counsel at the settlement stage illustrates the risks inherent in the practice. In a letter dated July 13, 1978, the District outlined a proposed desegregation plan and

offered counsel for the plaintiffs $400,000 in fees and costs. The reply of Fisher's attorneys, dated July 19, 1978 set forth objections to the plan, noting that it required school closures which imposed the burden of desegregation on minority children alone. The authors suggested that closures ought to be accompanied by new school construction at an appropriate site. Fisher's lawyers also advanced a counter-offer of $550,000 in fees and costs.

At the end of the month, they entered into a settlement mandating school closures and payment of $500,000 to plaintiffs' counsel. The compromise did not, however, require new construction in former attendance areas. Class members affected by them had uniformly opposed the closures which, as the trial judge specifically found, were <u>not</u> necessary to achieve desegregation.

In short, the negotiations produced a

compromise committing the District to increased compensation for opposing counsel without incurring the far greater expense of maintaining present schools or building new facilities.

The Court of Appeals properly concluded that a settlement resulting from combined negotaitions on fees and class interests must be "closely scrutinized". Assuming for the moment that such post hoc review will suffice to protect the class, it never occurred in the instant case.

The Ninth Circuit's requirement presupposes a heightened judicial concern for the adequacy of benefits received by the class weighed against the amount paid counsel for the time and effort expended in obtaining them. Here, plaintiffs' counsel negotiated a half million dollars in fees, while agreeing to dismiss all Title VI claims with prejudice. Although the settlement included provisions on cur-

ricula, testing and discipline, they were developed by Fisher's experts for the benefit of black children. The experts testified that similar efforts should have been undertaken on behalf of the Mexican-American class, but noted that they were never approached by Mendoza's counsel during the settlement negotiations. The compromise called for desegregation of three schools in addition to those specified in the June 5th Order because Fisher's lawyers demanded that concession. Counsel for the Mendoza class did obtain a pilot reading program based on the Spalding Method. It was open to thirty students on a voluntary basis; there were 17,000 children in the class at the time of settlement.

A gross disparity in the benefits received by the largest class emerges even without "close scrutiny" of the parties' compromise. The Ninth Circuit, however, simply did not attempt the very analysis

which it deemed essential whenever fees and substantive interests are negotiated simultaneously. The district court refused to entertain any evidence demonstrating the influence of fee demands on the overall settlement. Judicial review cannot operate to prevent abuses inherent in the technique unless this Court insists on genuine scrutiny of the final result.

Although it disapproved combined negotiations in the abstract, the Court of Appeals sanctioned the procedure sub judice. It observed that Government counsel participated in the negotiations and approved the compromise. Since they were present to protect class interests and could not recover attorney's fees, their involvement weighed heavily in favor of the settlement. The record simply does not reveal the extent or nature of their participation. The United States has not denied that fees were negotiated together with the rights of the

class, nor has it disapproved the procedure or sought to prevent counsel's gain at the expense of their clients. The mere presence of Government attorneys, who do not represent the class, is no guarantee against an improper compromise. Indeed, it cannot suffice without a specific showing that they actually protected class interests during negotiations which remain prima facie suspect.

The Court of Appeals also cited the trial judge's familiarity with the litigation as additional protection against an unethical compromise. In a school desegregation case, the remedial stage, however concluded, often exceeds the trial in difficulty as well as complexity. Swann, 402 U.S. at 11-14; Brown v. Board of Education, 347 U.S. 483, 495 (1954). The issues and evidence necessary to a proper resolution are not automatically determined at trial. Id. Where four years of litigation are con-

cluded in less than three months with a minimum of discovery or adversary presentation, the trial court cannot be intimately familiar with the special problems posed by a remedy for de jure segregation.

More importantly, the Appellate Court's reasoning begs the question. Improprieties in the course of settlement negotiations cannot be identified without an inquiry aimed specifically at exposing them. In Re General Motors Engine Interchange Litigation, 594 F.2d 1106, 1133, 1141 (7th Cir. 1979). In the instant case, the trial court refused to entertain evidence bearing on the course of negotiations or the role played by attorney's fees in shaping the final compromise. Its reliance on Rule 408 of the Federal Rules of Evidence was clearly erroneous. Id. at 1124 n. 20. Rather than seeking to enlighten itself on the dispositive issue or to protect the class against a tainted compromise,

the district court thwarted any inquiry on point.

Finally, the Ninth Circuit permitted combined negotiations on the theory that a statutory procedure existed whereby class counsel could have petitioned the trial court for a fee award. See 20 U.S.C. §1617. Where a separate statutory proceeding is available, any conceivable justification for simultaneously negotiating counsel's compensation and class interests disappears. By resorting to a fee petition, counsel would have avoided the very impropriety which the Court of Appeals recognized so clearly. The existence of an ethical and adequate alternative cannot seriously be invoked to justify methods prohibited by Cannons 5 and 7 of the Code of Professional Responsibility.

Adequate representation by counsel remains the touchstone of due process in any class action. Hansberry v. Lee, 311 U.S.

32 (1940). Adequate representation surely requires counsel to maintain undivided loyalty to the class. Where he proceeds to negotiate on their behalf, while simultaneously bargaining for maximum personal compensation, a fundamental conflict of interest arises. Its influence, both subtle and obvious, is not eradicated merely because plaintiffs' lawyers assure the trial court that they have proceeded in good faith.

The question now presented has profound implications for the proper management and conduct of class actions at the settlement stage. While joining the Third, Fifth and Seventh Circuits in disapproving combined negotiations, the Ninth Circut has proceeded to allow them for reasons which do not withstand close scrutiny. Definitive guidance from this Court on an issue of such growing importance is urgently required. Levin, "Practical, Ethical and

Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees are Authorized", CCH Clearinghouse Review, Vol. 14, No. 6, October 1980.

5. Seriatim Approval of a Remedial Desegregation Plan Negotiated as Part of a Class Action Settlement is Improper.

The Ninth Circuit concluded that the desegregation plan was not a settlement and that there was no evidence in the record demonstrating that it was negoitated as part of the compromise. Since class members were not notified of the plan hearing, nor given an opportunity to present objections to the remedial plan at the settlement hearing, determination of this issue is critical. In resolving it, the Ninth Circuit has totally disregarded the record.

It is not open to question or interpretation in this case. First, the settlement itself stated that the parties agreed to, inter alia, the provisions of the desegregation plan as set forth in that document (App.J , P.127). It is black letter law that a court may not go beyond the four corners of the settlement document

when construing its provisions. United States v. Armour & Company, 402 U.S. 673 (1971). An exception arises only where ambiguities in the agreement force the court to consider the circumstances in which the compromise was reached. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975). Aside from the fact that this settlement is absolutely unambiguous on its face, the circumstances surrounding its negotiation and approval demonstrate that the plan was nothing but a part of the settlement. In reaching a contrary result, the Ninth Circuit has totally disregarded this Court's decisions in Armour and ITT.

Final notice in a class action must contain a fair recital of the subject matter and the terms of the proposed settlement. Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (1977). The notice of settlement in this case described the

desegregation plan as part of the compromise and invited class members to attend the fairness hearing if they had any objections to it[6/] such references were proper only if the desegregation plan was an element of the compromise.

Counsel for both classes and the Government repeatedly informed the trial court that they had agreed to the desegregation plan only as part of the settlement and would either object to the compromise or present alternatives if the settlement were rejected:

> MR. MOORE: (attorney for the Government). . ."Your Honor, in light of the proposed settlement, the Government would reserve its right to cross examine the defendants with respect to the nine schools that the court found to be de jure segregated."

6/ As pointed out, infra, p. 51 the District Court then refused to allow any inquiry into the desegregation plan at the settlement hearing.

MR. BALLER: (counsel for Mexican-American class) "Your Honor, at this stage, ordinarily, we would have a considerable amount of examination, but since, as the Court is aware, there is a proposed settlement between the parties, and if that settlement is approved, it would not be necessary for us to examine on the proposed District's [desegregation] plan. For that reason I would like at this time to reserve the right to examine on some of the options in the event the proposed settlement is rejected by the Court."

MR. ZAVALA: "I, in the course of entering settlement negotiations with the District and Mr. SALTER and the Government, was well aware of the general feeling in this community against school closures. . .and the problem that I had with their position is simply that they are focusing on one particular aspect of the entire settlement. . ."

"We felt, Your Honor, and I think the Court knows this, that in putting together the overall settlement proposal, . . our position essentially on those proposals (school closures) is that in

> the context of the overall settlement, . . . these make sense."

These comments were made in open Court at the hearing on petitioners' motion for subclassification and at the hearing on the desegregation plan. Obviously, the trial court was fully aware of the role the desegregation plan played in the overall settlement.

The orders of the District Court are conclusive on the point. In every order addressing the issue, the Court recognized that the remedial plan was agreed to by class counsel only as part of the settlement:

> Order Approving Desegregation Plan, August 11, 1978:
>
> "Various plans have been offered by the defendants for the upcoming school year and their preferences have been indicated. Although all named plaintiffs were given the opportunity to object to the defendants' plans and to offer alternative plans of their own,

only Alberto Sanchez has done so.

All other named plaintiffs have entered into a proposed settlement with the defendants which resolve all issues raised in these consolidated cases. As part of the settlement, plaintiffs, other than Sanchez, have raised no objections to the plans offered by the defendants." (App. E p. 76-77).

Order Denying Certification of a Subclass, August 11, 1978:

". . . the other plaintiffs have only agreed to these closures as part of an overall settlement. Concessions of viable issues are necessarily made in settlement. . . there will be a hearing on the proposed settlement at which all class members will have an opportunity to be heard." (App. F p.101).

Order Approving Settlement, August 31, 1978:

"Counsel entered into a proposed settlement subject to class hearings and court approval. The proposed settlement included approval by plaintiffs of a desegregation plan . . .

The Court found the desegregation plan approved by the

parties to be fair, equitable . . .". (App. I, P. 114-15).

Furthermore, a review of the correspondence exchanged among counsel prior to the settlement leaves no doubt whatsoever that the plan was negotiated as a centerpiece of the agreement. Lawyers for the District consistently demanded that plaintiffs' attorneys agree to the remedial plan as the quid pro quo for concessions on remaining issues. In the course of negotiations, class counsel responded by insisting upon and obtaining certain changes in the remedial "plan", which merely became one more subject of the parties' bargaining. (App. Q-U, p. 189-240).

Although the Ninth Circuit characterized the District Court's approval of the desegregation plan as its "independent judgment", it necessarily rejected the reasoning of Pettway v. American Cast Iron

Pipe Co., 576 F.2d 1157 (5th Cir. 1978), on which it purported to rely:

> "We perceive a significant distinction between an after-the-fact conclusion that a court's judgment is essentially satisfactory and, all things considered, does not justify an appeal, and a before-the-fact consent to the precise terms of defendants' proposed decree." 576 F.2d at 1172.

It is beyond dispute that the desegregation plan was presented to the trial court for its approval at the August 8 and 9 hearing. A settlement had already been reached in the case and, as the Ninth Circuit observed, the agreement provided that there would be "no further attacks on the desegregation plan. . .". (App. A , P. 10-11). Counsel for the classes and the Government then urged the Court to approve the desegregation plan as part of the settlement. Mr. Moore, counsel for the Government, stated:

> "We would hope again that the plans that we've come up with or the plans that we've agreed upon would be acceptable to the Court." (Made in open court, August 9, 1978).

In the unmistakable language of an order approving a settlement, the trial court deemed the plan "fair, equitable and curative". Pettway, 576 F.2d at 1147-75 n. 15.

Recognizing the absolute clarity of the record on this point, the Ninth Circuit reasoned that even if the desegregation plan were negotiated as part of an overall compromise, the District Court was still free to assess it separately, and approve it before the settlement hearing itself. (App. A , P.39,n.11). Although class members were not notified of the hearing on the plan, nor given an opportunity to challenge it at the hearing on the remainder of the settlement, such independent assessment and approval by the trial court was proper even without those

procedural safeguards.

It must be emphasized that class members opposing the desegregation plan were unrepresented at the hearing on its terms and conditions. Their counsel urged the Court to approve the plan as part of the settlement while acknowledging that class members affected by it were opposed to the provisions on school closures. The Ninth Circuit held, however, that the hearing on the desegregation plan was governed not by Rule 23(e) of the Federal Rules of Civil Procedure, but by the law controlling school desegregation remedies. (App. A , P.22). Hence, if a settlement in any school desegregation case includes a remedial plan, it may be considered and finally approved before the remaining provisions of the compromise are even reviewed by the Court.

The Manual for Complex Litigation expressly disapproves that precise technique.

Manual, Section 1.46. It violates the most basic principle governing approval of a class action settlement: The compromise must either stand or fall as a whole. Its components are inextricably linked during the negotiating process itself and may never be evaluated as though they were separate agreements at which the parties would have arrived without conceding other interests of the class. Id. As the sequence of events in this case amply illustrates, seriatim approval of settlement terms may easily proceed without prior notice to the class or a meaningful opportunity to evaluate critical provisions, prepare objections or present testimony at a fairness hearing. Separate, independent consideration of isolated provisions in a settlement prevents the trial court or class members from evaluating the compromise as a whole. Settlements are not negotiated element by element. Every benefit

received depends on some concession by class counsel. Here, the settlement which included the remedial plan also dismissed all pending Title VI claims with prejudice prior to trial, foreclosed the plaintiffs' right to appeal the June 5th Order, and awarded their counsel $500,000 in fees as well as costs. Whatever the merit of the plan, it was achieved at high cost to the Mendoza class.

The overall balance of such gains and losses determines whether the settlement is fair and within the range of reasonableness. That fundamental principle applies regardless of the nature of the issues involved in the litigation. If it is a product of the bargaining process, a remedial desegregation plan must be considered in light of the entire compromise. It must be evaluated together with all other provisions of the settlement at a single fairness hearing. Armstrong v. Board of

School Directors, supra; Manual on Complex Litigation, 1.46. The Ninth Circuit's disposition of the present issue is wholly at odds with the reasoning and holdings of the only other Circuit decision on point.

The opinion below sanctions an unprecedented approach to the approval of class action settlements. Apparently, the Ninth Circuit has concluded that procedures required in all other such litigation need not be followed where a desegregation case is settled. As Armstrong emphasized, the interests at stake in a desegregation proceeding are unusually important to the community as well as the litigants. Settlement procedures must be designed to insure full scrutiny by both the trial court and the class. Rather than requiring these essential safeguards, the Ninth Circuit has upheld techniques which encourage summary approval of

individual settlement provisions and minimal attention to the remainder. This Court should not allow such casual handling of the most important business before the federal judiciary.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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